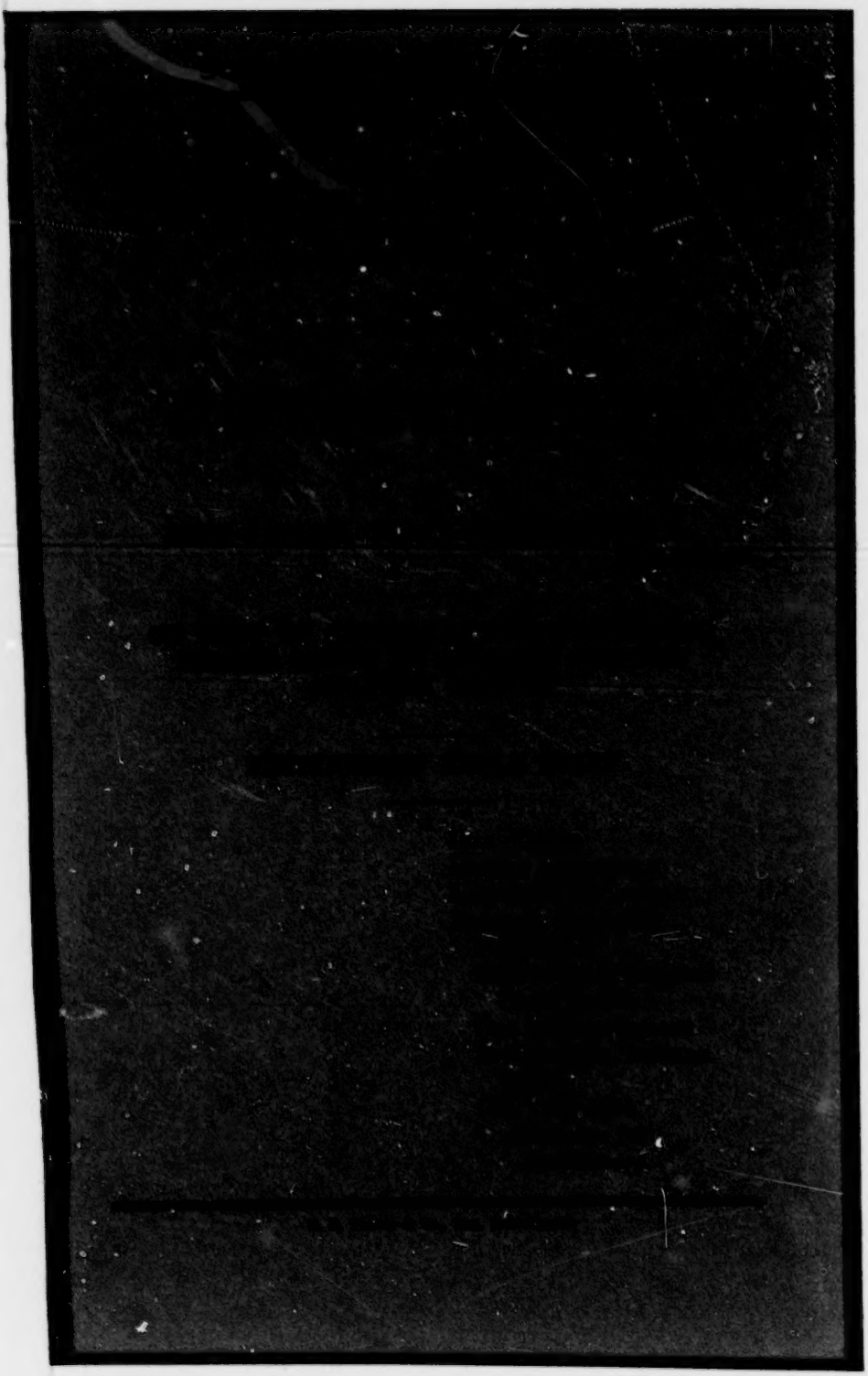

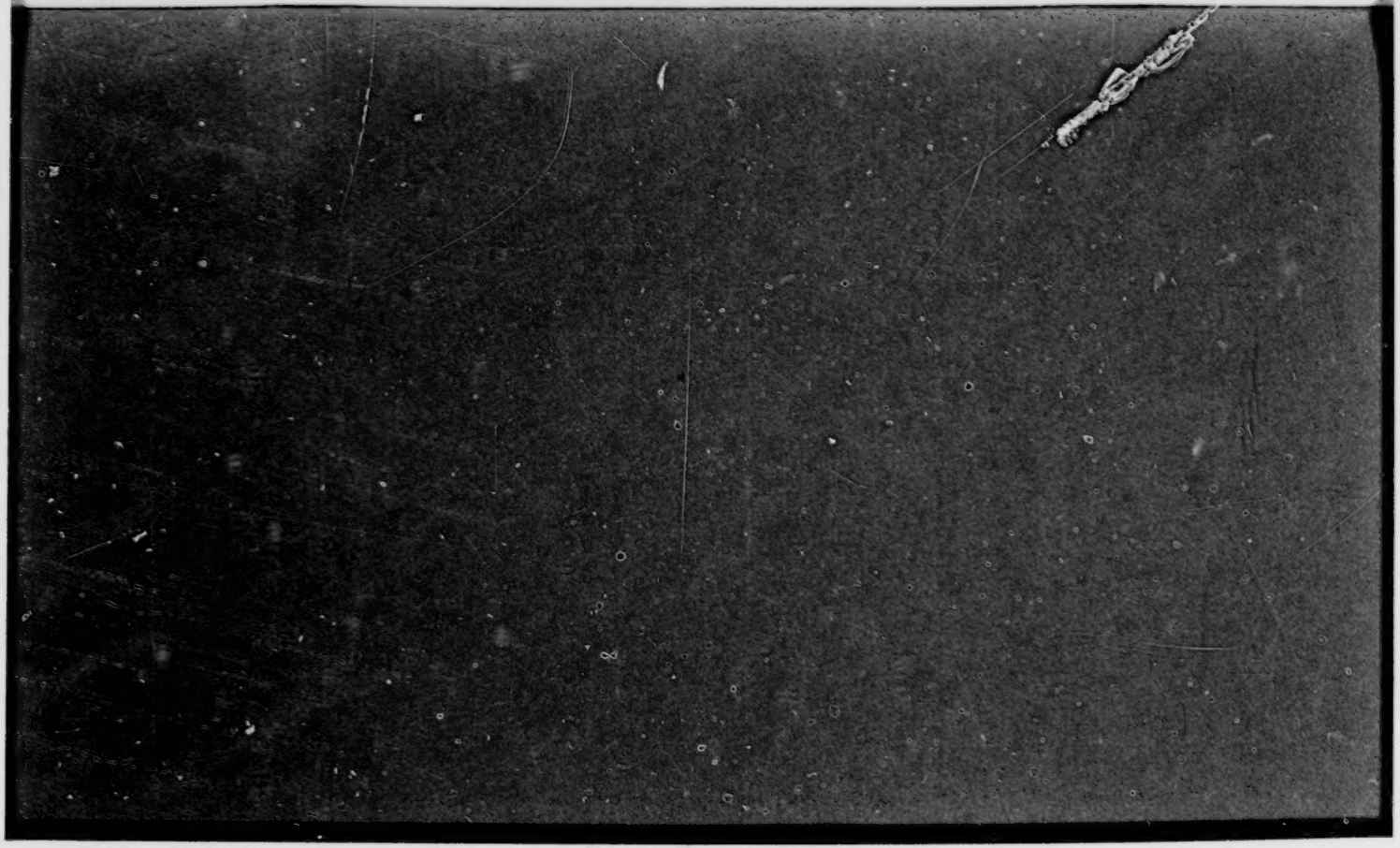

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IN THE

Supreme Court of the United States

TERM 1973

NO. 73-1347

THE BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, et al.,
Petitioners,

vs.

JEFF JACOBS, SUSAN CHANDLER, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

ARGUMENT I

A. CRIMINAL STANDARDS FOR OVERBREADTH AND VAGUENESS NOT APPLICABLE TO BOARD REGULATIONS.

Respondents make no direct or relevant reply to Petitioners' argument that the identical constitutional standards and tests for overbreadth and vagueness which are applicable to criminal statutes should not be applied to school board regulations subjecting students to disciplinary measures for certain activities in schools. No cases were cited supporting the Seventh Circuit's view that the stand-

ard should be the same. Instead Respondents merely cite numerous cases that have absolutely no relevance to this issue and can serve only to clutter the record. For example, they state that the standards or tests applied in First Amendment cases under the labels "vagueness" and "overbreadth" are also employed in civil contexts, citing two *criminal* cases in support of this proposition. *Connally v. General Construction Co.* (1926), 269 U.S. 385, 70 L.Ed. 322, held fatally vague a criminal statute which threatened an employer with criminal prosecution for failure to pay current wages in the locality without any definition of what sum constitutes a "current wage" or what the term "locality" meant. However, the Court said "In other connections or under other conditions, the term 'locality' might be definite enough, but not so in a statute such as that under review imposing criminal penalties." (70 L.Ed. at 330) The second case cited by Respondents, *Lanzetta v. New Jersey* (1939), 306 U.S. 151, 83 L.Ed. 888, also involved a criminal statute which made it a crime for a person not engaged in any lawful occupation who had previously been convicted of a crime or disorderly conduct to be a known member of any gang of two or more persons. The penalty was 20 years imprisonment. In fact, most of the cases cited by Respondents were criminal cases and thus not applicable to this issue.

Instead of discussing the issue, Respondents quote broad statements from cases to the effect that students have First Amendment rights and that schools should not be enclaves of totalitarianism or attempt to foster a homogeneous people. See, *e.g., West Virginia State Board of Education v. Barnette* (1943), 319 U.S. 624, 87 L.Ed. 1628, which held unconstitutional a board regulation requiring a compulsory flag salute by students. Students were expelled for refusing to salute the flag on the grounds of religious principles and expulsion subjected them to being proceeded against as

delinquents and also subjected parents to criminal prosecution for such expulsions. This case did not involve vagueness or overbreadth. It is important to note, however, that the Board has never suggested that the First Amendment does not apply to students or Board regulations. The issue is whether the *same* standards of specificity applicable to criminal statutes or even to statutes in general must also apply to Board rules and whether courts can declare facially void for overbreadth a Board regulation because it conceivably could be applied in an unconstitutional manner. Such a facial approach, particularly when none of the Rules in question have even been applied to any students, is not required by the Constitution and has been employed by this Court only in exceptional circumstances.

The two cases of this Court cited by Respondents to support their argument that it is proper to consider hypothetical impermissible applications of statutes (Resp.Br. 42) involved *criminal statutes* and factual situations and objectives so far different from the case at bar in terms of the actual and apparent danger of suppressing important protected speech that their relevance to the instant case is at best remote.

The claim that the First Circuit and this Court have utilized the same facial approach in examining Board rules as the courts below is unmeritorious. In *Riseman v. School Committee of Quincy* (1st Cir., 1971), 439 F.2d 148, the First Circuit declared a prior restraint rule containing no procedural safeguards unconstitutional *as applied* to a student. The case is not even pertinent to this issue. This Court, in *Tinker v. Des Moines Independent School District* (1969), 393 U.S. 503, 21 L.Ed. 2d 731, and in other cases cited by Respondents (Resp.Br. 25), has never implied that a school board must be held to the same strict standards of specificity as are legislatures in defining criminal conduct. To suggest that *Tinker* must be overruled to hold for the

Board on this issue is ridiculous, since *Tinker* never even discussed such a facial approach.

Respondents incorrectly state that the Board has advanced only three reasons for its position that standards used to facially invalidate criminal statutes should not be applied to Board regulations. The Board's Brief discussed at least eight reasons, five of which are ignored by Respondents. The Board fails to see any merit in Respondents' argument that simply because an Indiana statute provides elaborate procedural safeguards governing expulsion of students, all substantive standards in judging whether a *criminal* statute is fatally overbroad or vague must also be applied to Board rules.

The mere fact that many procedural safeguards are accorded to students before they may be expelled from school further supports the Board's power to promulgate more flexible rules with greater breadth than may be tolerated in penal statutes because the expulsion statute insures that such rules would not be acted upon arbitrarily.

B. COMMUNITY-AT-LARGE V. SCHOOL. MAY CONDUCT OR LANGUAGE OF MINOR STUDENTS NOT REGULATED IN THE COMMUNITY-AT-LARGE, BE CONSTITUTIONALLY REGULATED IN ELEMENTARY AND SECONDARY SCHOOLS?

The first point made by Respondents under this issue asserts that schools may not generally prohibit distribution of non-official student publications. Yet the Board has never argued, nor do its Rules require, such a general prohibition, even in the schoolhouse. The Board has merely contended that the geographical location of the actor is an important factor in determining the constitutional protection that should be afforded to his or her acts. Due to significant differences between a grade or high school and the community-at-large, the Board Rules in question are reasonable,

necessary and should be upheld, even though some of the conduct regulated by these Rules might be accorded constitutional protection when engaged in by persons in the general community. Yet the many cases cited by Respondents and the Court of Appeals concern behavior of adults in the community-at-large under entirely different circumstances, and are not valid support for the facial invalidation of the Board Rules.

The second contention of Respondents is that the genuine question is whether there was any evidence introduced by the Board to justify the various Rules in question. This misleading argument is made repeatedly throughout Respondents' Brief. It is important to remember, however, that the Rules in question were adopted *after* the hearing and that these Rules have never been applied to Respondents or any other students. Since these Rules differ substantially from the original broad Rules requiring prior approval before any material is distributed or sold at school, which were the only Rules in existence at the time of the evidentiary hearing, it is both inappropriate and misleading to repeatedly remark that the Board introduced no evidence to justify Rules which were adopted after the hearing. The Board was never given an opportunity to apply these new Rules to any situation because the Court declared them unconstitutional for overbreadth.

Respondents' third argument (Resp.Br. 32) is not relevant because it is basically a statement that the special characteristics of the school environment require greater exercise of First Amendment rights at school than in many environments, such as a jail or hospital. Respondents apparently missed the point of the Board's argument. The Board would scarcely characterize a jail or the U. S. Army as the community-at-large. The Board's contention was twofold—One, that the Board or school officials should constitutionally be able to control certain behavior inside a

schoolhouse which constitutionally might be protected in the community-at-large. Therefore, any cases cited concerning attempts to regulate expression or conduct in the general community cannot be validly applied to the school community due to its special characteristics and goals. Second, in support of this proposition, the Board believes that valid analogies can be made to constitutional restrictions or regulations of conduct permitted in other institutions, such as hospitals, or the Army, due to their special characteristics. Although the environment and purpose of the Indianapolis schools cannot be equated to that of the military or a jail, certain justifiable comparisons can be made because of the fact that these institutions, like elementary and secondary schools, have different structures and goals than the general community and a special need for maintenance of discipline and order, and thus the officials of said institutions must have greater discretion and broader powers to prescribe and control the conduct of their inhabitants. Said controls might not be constitutionally permissible outside of the institutions. A recognition of this analogy and the principles applied in such cases as *Parker v. Levy* (1974), — U.S. —, 41 L.Ed.2d 439, in no way requires that *Tinker* must be overruled as Respondents suggest. In fact, this Court recognized in *Tinker* that First Amendment rights are to be applied in light of the special characteristics of the school environment.

It should also be emphasized that the Board Rules make no attempt to regulate any behavior outside of the school environment and thus students are left free to distribute, sell and say whatever they wish beyond the schoolhouse gates.

The Board Rules control only that behavior which, in the opinion of the Board, is necessary so that vital educational goals can be achieved in an atmosphere which must be maintained if any learning is to take place. If children

could be free to say, sell and distribute whatever they please and whenever they please in the schoolhouse, the schools might as well close because educational objectives could not be achieved in such a chaotic atmosphere.

The Board fails to see the relevancy to any issue in this case of statements made by Respondents that personal inter-communication among the students is a significant activity which could occur in the cafeteria, on the playing field or on the campus during authorized hours and that a robust exchange of ideas in schools is to be encouraged (Resp. Br. 34-36), since such communication would be encouraged rather than prohibited by the Rules in question. Also totally irrelevant is the case of *San Antonio School District v. Rodriguez* (1973), 411 U.S. 1, since this decision upheld the state's method of financing education, stating that it rationally furthered a legitimate state purpose and thus did not violate the equal protection clause and was a responsible attempt to arrive at practical and workable solutions to educational problems. The mere fact that this Court found that education presents a myriad of "intractable economic, social and even philosophical problems" does not in any way demonstrate any constitutional violation presented by the Rules in the case at bar. We note that Respondents, in quoting this case, omitted the rest of the paragraph, stating that "in such circumstances, the judiciary is well advised to refrain from imposing on the state inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keep abreast of every changing condition." (36 L.Ed.2d at 49) The state's statutory system for financing public education, even with its conceded imperfections, was upheld nevertheless because it was rationally connected to a legitimate state purpose. This is precisely what the Board has been arguing in the case at bar.

Several inaccuracies appear in Respondents' Brief (36-37). It is not true that the students voluntarily terminated distribution before any official or teacher requested that they stop distributing the publication. Distribution of the *CCC* ceased only after Dr. Kalp, then Assistant Superintendent, ordered it to cease because of the obscenities and indecencies contained therein. (App. 30) The statement (Resp. Br. 37) that each of the Rules now in question was adopted in a relative vacuum and not in response to any behavior by the Respondents except for the institution of this litigation is somewhat misleading, since both amendments of the Rules were in direct response to court orders requiring such amendments. It is true that the Rules were never applied to the students. The Board's original Rules requiring prior approval were declared unconstitutional by the District Court which ordered the Board to adopt new guidelines. (App. 1-2) The first amendment of the Rules also required prior approval of student literature but added numerous safeguards. After the Court made it clear that no prior restraints would be tolerated, it ordered these Rules further amended (App. 2). This order resulted in the second amendment of the Rules permitting only subsequent restraints. The invalidation of both amendments was appealed.

The remainder of Respondents' argument (Resp. Br. 37-46) is misplaced since it is not pertinent to Question I or any issue thereunder. Respondents attempt to negate two cases (cited by the Board under Question II) which upheld rules on sales and solicitations similar to Board Rules 11.06 and 11.05, Section 1.3.1.5. This discussion properly involves Question IIA and will be discussed under that issue.

Then Respondents list nine statements appearing in the Board's Brief under various issues which allegedly constitute speculative problems resulting from the distribution

of the *CCC* in the schools. Respondents repeatedly attempt to mislead this Court by claiming that the Board introduced no evidence to demonstrate that any of these harms or problems occurred despite widespread distribution of the *CCC* in the Indianapolis high schools over a period of one year prior to the commencement of this suit and during the two years since the Board was enjoined from enforcing the Rules here in question. (Resp. Br. 38, 46)

This argument is highly improper and misleading for several reasons. First, although Respondents claim that the *CCC* was distributed in Indianapolis high schools over a period of one year, there is no evidence in the record to support this allegation. The record reveals sporadic distribution of the *CCC* by a few students in two large high schools and elsewhere in the general community. A total of some 200 copies were distributed both on and off school property. Second, to state that the *CCC* has been distributed for two years since the District Court's injunction against the Board and that none of the dire predictions have resulted from such distribution appears to be a desperate attempt to divert the attention of this Court from the issues properly under consideration—those issues presented below and founded on the record below. This is an appeal to this Court and not a trial of new matter. Petitioners submit their case on the record below. Petitioners do submit, however, in response to the improper claims of Respondents, that only a very few copies of the *CCC* were distributed on school property (outside two high schools) since the injunction, and also that there are serious problems in the schools due to the decision and injunction of the courts below.

Third, the only hearing in this case was a brief one concerning the validity of Rules requiring prior approval of all exhibits, publications, and sales and solicitations at school, which Rules contained no procedural or substantive

safeguards and are not in question at this time. There was no hearing on any of the subsequent amendments of these Rules and thus it is improper to chastise the Board for its failure to introduce evidence to support the validity of new Rules when in fact no evidence was presented at all in regard to these Rules. All the Rules now in question were declared facially void for overbreadth before the Board had any opportunity to apply them to any students. It should also be obvious that many of the new Rules, such as those subjecting students to punishment for distributing anonymous literature or literature causing a significant disruption in school, were Rules which formerly were not necessary because schools, under the original Rule, were given unlimited discretion in approving all materials prior to their distribution in school. In spite of this, there is evidence in the record supporting the nine problems taken from the Board's Brief. Dr. Kalp's testimony was not simply an abstract speculative opinion, but was based on his lengthy experience and expertise in school matters.

The second quotation from Petitioners' Brief discussed by Respondents concerned the interest of the Board in protecting the safety and well being of its students and identifying students who abuse their freedoms and harm others through the use of fraud, libel and obscenity. This was a major reason for the Board Rule prohibiting the general distribution of anonymous literature in its schools. This Rule, of course, was never applied to Respondents and thus, contrary to their statement that the Board was charging the Respondents with fraud, no such charge was made or implied. There was, however, evidence concerning an article in the *CCC* containing false statements about a high school coach, which statements were considered to be quite serious by the Administration and thus were investigated and found to be totally false. (App. 53-55, 48-49) The obscene language found in the *CCC* was the major reason for

its disapproval by the Administration. The Board maintains that the identification Rule is necessary because it is the only reasonable means to identify those responsible for these abuses. The concept of anonymity really has no proper place in the schoolhouse and students have always been required to identify themselves on request by any school official or teacher, regardless of whether they are distributing literature or not.

Respondents' suggestion that other administrators or school officials did not share Superintendent Kalp's belief that the *CCC* was harmful to minors and its distribution at school would impede important educational goals is contrary to the evidence. Mr. Potter did not disagree with Dr. Kalp's decision or the reasons for it and his statement was taken totally out of context by Respondents. The Court is referred to the affidavit signed by 220 parents and the high school principals as to the harmful effect of the *CCC*. (App. 63-64) No contrary affidavits were offered.

C. MINORS V. ADULTS. IS IT CONSTITUTIONALLY PERMISSIBLE FOR SCHOOL AUTHORITIES TO IMPOSE GREATER RESTRICTIONS ON MINORS THAN THE STATE COULD CONSTITUTIONALLY IMPOSE ON ADULTS WITHOUT VIOLATING THE FIRST AMENDMENT?

The third crucial factor to be considered by this Court in its determination of the extent of constitutional restrictions upon the power of the Board to adopt Rules governing student behavior is the age of the students involved. The Board's position is clear and well supported: Schools may impose greater restrictions upon minors than the state could constitutionally impose on adults without violating the First Amendment. Children have always been both protected and controlled in our society for obvious reasons. Since the Rules in question apply to minors, not

adults, this factor cannot be ignored. Thus Respondents' total failure to devote one line in their 113 page Brief in reply to this crucial issue is most significant.

D. COURT'S INJUNCTION IS OVERBROAD.

Another crucial question closely related to the overbreadth issue is the invalidity of that part of the District Court's order which permanently enjoins the Board from the promulgation or enforcement of any Rule which would "subject any covered student to the threat of discipline because of the reaction or response of any other person to the written material. . . ." (Pet. Cert. 14A) It seems unlikely that the Court of Appeals was unaware of the paralyzing effect of this injunction, which it upheld, since it was both briefed and argued by Petitioners in the Seventh Circuit. However, both the Court of Appeals and Respondents completely ignored and failed to respond to any of the Board's objections to this unwarranted injunction. Thus the arguments and reasons advanced by the Board for vacating this broad injunction remain completely undisputed.

Since this injunction clearly violates the principles announced by this Court in *Tinker* and several other decisions (Pet.Br. 47-48) and prohibits the Board from disciplining students who cause riots and other significant disruptions at school, Petitioners hope that this Court, realizing the significance of Respondents' silence and the serious consequences and invalidity of this injunction, will vacate it. This is particularly essential because the Board is now required by statute to adopt written Rules before it may discipline its students and this injunction destroys the legal capacity of the Board to adopt such Rules.

ARGUMENT II

A. SALES AND SOLICITATIONS.

1. *Board May Prohibit Use of School Property for Non-School Purposes.*

The Board stated five important reasons for upholding its Rules regulating sales and solicitations in the Indianapolis Public Schools, the first being the power of the Board to prohibit the use of its schools for non-school purposes. Sales and solicitations in school for the personal profit of students is clearly a non-school activity. In support of this basic principle, five cases were cited, among them *Adderley v. Florida* (1966), 385 U.S. 39, 47. Respondents ignored the other cases cited by the Board and attempted to distinguish *Adderley* which upheld defendants' convictions for trespass for refusing to leave an area outside of a jail. Contrary to Respondents' assertion, the applicability of *Adderley* to the instant case does not depend on equating a jail and a school, particularly since the trespass occurred on the grounds outside the jail. Although the Court did distinguish these grounds from public streets and parks, the ruling of the Court that ". . . the state has the power to preserve the property under its control for the use to which it is lawfully dedicated" was clearly not limited to jail property. This rule has been applied to many types of government institutions and property and thus this decision is most relevant to the case at bar. Surely a school board has as much right to regulate the use of school corridors and classrooms and prohibit their use for non-school purposes. Respondents cited no cases to the contrary.

The cases and arguments of Respondents are in no way pertinent to the issue of whether the Board regulation of sales and solicitations in school violates the Constitution. For example, *Grody v. State* (1972), 257 Ind. 651, 278 N.E. 2d 280, invalidated a statute making it a crime for *any person* to refuse to leave the premises of any educational

institution when requested *regardless of the reason therefor.* Petitioners fail to see what possible comparison could be made between this penal statute and the Board Rules on sales and solicitations. Although the Court did state that the ends of education "require an assured freedom to speak and publish ideas and to assemble to discuss them . . ." the remainder of that quotation which Respondents omitted said that such freedom "must be in a manner consistent with the orderly use of the property for its dedicated purposes." (278 N.E.2d at 284) This is, of course, a significant omission since the Board has maintained that the sales and solicitation Rules prevent obvious problems and accomplish valid educational goals and thus said Rules are consistent with the orderly use of school property for its dedicated purpose.

Respondents imply (Resp.Br.49) that the Board would be justified in prohibiting commercial activities on school premises but that the *CCC* was not a commercial activity because it did not make a profit. Whether a business or commercial activity realizes a profit is totally immaterial to its characterization as commercial, but in fact, the evidence revealed that a profit was made on the sale of one of the issues of the *CCC* (Tr. 161). Respondents' testimony also revealed that the students hoped to realize a profit by selling the *CCC* to any person interested in the general community as well as at school. (Tr. p. 90; 244-245).

Respondents' comment (Resp. Br. 50) that the effect of the Rules on sales and solicitations is to limit student communication by confining expressions only to those receiving approval is false and misleading. There is absolutely nothing in either of these Rules concerning the content of any publication or the type of product sold in the schools. The Board and Superintendent have always been concerned about the effect of sales and solicitations on students and should not be forced to allow school property to be used

for any commercial purpose. The Board should have the right to prohibit solicitations and sales at school regardless of the purpose, product or person involved.

The cases cited by Respondents (Resp.Br. 51-52) are readily distinguishable from the case at bar. For example, *Grosjean v. American Press Company* (1935), 297 U.S. 233, invalidated a state license tax on newspaper publishers with a certain circulation for the privilege of selling and charging for ads in said newspapers. Since no tax is involved in the case at bar and no attempt has been made to restrict sales and solicitations by students in the community-at-large, this case is not relevant to the issue of whether the Board has the power to regulate such non-school activities on its property. A criminal ordinance in *Lovell v. Griffin* (1937), 303 U.S. 444, prohibited any distribution (whether free or sold) of any literature of any kind within an entire city without a permit and the Court noted that the law was not limited to literature that was obscene or offensive to public morals or that advocated unlawful conduct. This ordinance can scarcely be compared to any Rules in the case at bar because it contained absolutely no restrictions in its application.

Near v. Minnesota, ex rel. Olson (1930), 283 U.S. 697, like the other cases cited above, did not involve a regulation of sales of newspapers and other products on certain types of property but involved a prior restraint upon publications and thus is not relevant to this particular issue. Contrary to Respondents' assertion, absolutely no prior restraints are involved in either of the Board's Rules on sales and solicitations. Respondents' claim that *Time v. Hill* (1967), 385 U.S. 374, supports their argument that the sale of student newspapers at school is protected by the First Amendment is totally inaccurate. *Time* did not involve schools, student publications, or sales and solicitations, but

was an action for damages under a statute protecting the right of privacy.

Murdock v. Pennsylvania (1942), 319 U.S. 105, 87 L.Ed. 1292, also involved a criminal ordinance imposing a license tax for the privilege of soliciting within a city. The constitutionality of this tax as applied to those selling religious publications was the only issue in this case. The Court noted that the problem of drawing the line between a purely commercial activity and a religious one will at times be difficult, but the mere fact that the religious literature is "sold" by itinerant preachers rather than "donated," does not transform evangelism into a commercial enterprise. The majority concluded that the activity was religious rather than commercial, since petitioners were not selling their literature in the sense that ordinary merchandise was sold, but used the money and contributions received toward petitioners' activity, which was charitable and from which there was no commercial gain. The selling activities were merely incidental and collateral to their main object which was to preach and publicize religious doctrines. The facts and issue in *Murdock* are quite different from those in the case at bar. Indeed, this Court noted that in *Jamison v. Texas* (1942), 318 U.S. 413, 417, it held that the "state can prohibit the use of streets for the distribution of purely commercial leaflets, even though such leaflets may have a civic appeal or moral platitude appended."

In conclusion, none of the cases cited by Respondents are relevant since none suggest or imply that an elementary or secondary school could not regulate or prohibit sales, solicitations, or any commercial activity on school property during school hours.

2. *Rule Upheld If Reasonable Basis For It.*

The Board cited several cases supporting its second argument that the Rules on sales and solicitations should be

upheld since there is a reasonable basis for them. In reply to this argument, Respondents, ignoring these cases, contended that the Rules are not reasonable because there was no evidence that sales and solicitations at school would materially and substantially disrupt the school. Yet there was no evidence that the students attempted to sell or solicit funds for more than a few copies of the *CCC* on school property. The students testified that many copies were given away and they tried to distribute it anywhere they could, including the general public beyond the schoolhouse gates. Even if 100 copies were sold over a period of time in an Indianapolis high school such as Tech, with over 5,000 pupils, this could scarcely be characterized as a general distribution. Thus Respondents have attempted to paint a picture which distorts reality.

Respondents do not deny that the acts of selling or soliciting money would distract students from their assigned tasks in class or delay passage between classes. Although a few sales or solicitations by students might not substantially interfere with the orderly operation of the entire school, this alone, is not a true test, for if it were, the enforcement of any general Rule would rest on the effect each individual case had on the educational process. Turmoil and controversy would then be invited and such a variable individual criterion would destroy the meaning and application of the constitutional guarantee of equal protection. Once the gates are lowered, or the standards destroyed, it is reasonably probable that students would be pestered to buy all sorts of items, all to the detriment of quality education. Thus, the reasonableness of a Rule does not depend upon the effect of its violation by one or a few students. Many courts have recognized this fact. For example, the Sixth Circuit in *Gfell v. Rickelman* (6th Cir., 1971), 441 F.2d 444, expressly rejected the contention that the reasonableness of the rule (on hair length) should be judged only in relation to the activities of a particular student. "Rather reason-

ableness is to be assessed in the context of the *general purposes* of the school itself." (441 F.2d at 447).

The Indianapolis Public Schools have always had a Rule prohibiting sales and solicitations at school without prior approval. Such a Rule has been deemed essential for the reasons stated in Petitioners' Brief. Respondents' mockery of any legitimate interest or goal of the school such as the need to create and maintain an academic atmosphere and order reveals that these students do not believe that any regulation of their conduct could be justified under any circumstances.

They argue that even if the sales Rules are reasonable, they are still unconstitutional for overbreadth, citing *Broadrick v. Oklahoma* (1973), 413 U.S. 601, as support. (Resp. Br. 54) It is interesting that they should cite this case since this Court in *Broadrick* upheld the enforcement of a statute which prohibited state employees from soliciting or receiving political contributions among their coworkers. Even though the *Broadrick* statute conceivably could have been applied unconstitutionally to others not before the Court, this Court rejected the application of the overbreadth doctrine in this manner and noted that the overbreadth which may exist should be cured through a case by case analysis.

Respondents also relied upon two decisions of the Seventh Circuit, neither of which even raised the issue of sales or solicitations in school.[1]

The Board's reliance upon *Cloak v. Cody* (N.D.N.C., 1971), 326 F.Supp. 391, and *Katz v. McAulay* (2nd Cir., 1971), 438 F.2d 1058, *cert. den.* 405 U.S. 933, was not misplaced as Respondents suggest. (Resp. Br. 37-39, 55) Both

[1] *Scoville v. Board of Education of Joliet Twp. H.S. Dist. 204* (7th Cir., 1970), 425 F.2d 10, and *Fujishima v. Board of Education* (7th Cir., 1972), 460 F.2d 1355.

of these decisions upheld rules prohibiting sales and solicitations at school which were substantially similar to those in the case at bar. In *Cloak* the court held that the plaintiff student was not entitled to damages or an injunction against the board for enforcing the rule prohibiting all sales and solicitations at school. The student's appeal was dismissed as moot because he had graduated and it was not a class action.

Respondents attempt to distinguish *Katz* from the case at bar in two respects. First, the leaflets freely distributed by students in *Katz* contained a request for funds to help pay for legal expenses of certain defendants then on trial. Although the purpose of the solicitation was different from the instant case, this factor was immaterial since the board rule subjected students to expulsion for "soliciting funds from the pupils in the public schools" for any purpose. However, Respondents' emphasis of the purpose of the solicitation as a factor to be considered is an apparent recognition of the Board's right to regulate certain sales and solicitations at school. The second distinction was Respondents' claim that the leaflet in *Katz* was prepared by non-students although this was never explicitly stated in the opinion. Nevertheless, a leaflet prepared by non-students also would have violated the Rule which was upheld. Elsewhere in their Brief, Respondents argue that it is immaterial who writes the material that students seek to distribute. (Resp. Br. 66-68)

The specific sales Rule on literature (Section 1.3.1.5 of Rule 11.05) was not written, as Respondents suggest, for the purpose of preventing any distribution of non-official student publications such as the *CCC*. Obviously, newspapers and other publications are covered by Rule 11.06 which prohibits sales of merchandise and solicitations for any cause at school. *People v. Passafume* (1940), 22 N.Y.S. 2d 785 recognized that newspapers are "merchandise" and

that the First Amendment was not designed to confer special privileges upon persons engaged in the publishing business. The Court also noted that the fundamental difference between the regulation of the business of selling goods and interference with the free distribution of printed matter was recognized by this Court in *Schneider v. Town of Irvington* (1939), 308 U. S. 147; 84 L.Ed. 155. Also *Breard v. Alexandria* (1951), 341 U.S. 622, 95 L.Ed. 1233, which upheld a criminal ordinance prohibiting solicitations of magazine subscriptions in the city without a license, has never been overruled. Surely the Board has a greater right to regulate solicitations on its own property than the city has to regulate solicitations on private property as was permitted by this Court in *Breard*.

The main difference between the original and present general Rule (11.06) on sales and solicitations is that the former prohibited any sale or solicitation at school without the Superintendent's prior approval and the latter permits no prior restraints. Since the Board's original Rule prohibiting all sales and solicitations had been in existence for many years it is unfair to suggest that the amended Rule was adopted to suppress the distribution of literature. Because the District Court ordered the Board to amend its Rules due to the Court's disapproval of any prior restraint and because the approval of some sales or solicitations would subject the Board to charges of discrimination, Rule 11.06 was amended to its present form. Although it was unnecessary to adopt an additional specific Rule on sales of literature, Section 1.3.1.5 of Rule 11.05 was added simply for clarification and so that all regulations affecting literature could be found in a single resolution. If Rule 11.06 is constitutionally applicable to sales of literature, then it should not be unconstitutional to also specifically refer to such sales in Section 1.3.1.5. This is certainly not a case where the Board has prohibited just the sale of literature,

while allowing other products to be sold in the schools. The general Rule was held overbroad presumably because it could be applied to literature. But when a "writer offers his works for sale, he engages in commerce like any other merchant and becomes subject to reasonable, necessary regulation." *People v. Passafume* (1940), 22 N.Y.S.2d at 785, 788.

This Court has recognized that freedom of the press should not be twisted into a license to escape commercial regulations affecting persons engaged in other business pursuits and has held that the press has no special immunity from regulations applicable to business in general. *Mabee v. White Plains Publishing Co.* (1946), 327 U.S. 178, 184. Thus the Court of Appeals, while recognizing the power of the Board to prohibit commercial activities on school premises erroneously assumed that persons selling literature must be accorded special privileges.

B. DISRUPTION RULE.

Section 1.1.1.3 of Rule 11.05 provides:

> "No student shall distribute in any school any literature that is either by its content or by the manner of distribution itself, productive of or likely to produce a significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis Public Schools, or injury to others."

Respondents did not dispute the validity of any of the ten major arguments advanced by the Board for upholding this Rule. Instead Respondents state three invalid reasons for declaring this Rule void on its face for vagueness and overbreadth. First, they allege that this Rule requires student literature to be reviewed by the Board prior to its distribution, which simply is not true. In fact this Rule amended the disruption Rule requiring prior review. The prior restraint Rule (discussed in Question 4) was ordered

amended by the District Court because it believed that any prior censorship of student literature was unconstitutional. None of the amended Rules examined in this second question presented for review constitute prior restraints on student literature. Respondents' repeated claim that all of these Rules require prior review reveals that they do not understand the difference between prior and subsequent restraints.

Prior censorship means the official power to examine printed matter and films before they are distributed in order to approve or reject the content thereof. *See, e.g., Burstyn v. Wilson* (1952), 343 U.S. 495, 96 L.Ed. 1098. The disruption Rule, as well as the other Rules examined under this question, do not permit any prior censorship since they do not require that students submit materials to any person prior to distribution. No prior screening or suppression of the contents of any literature is permitted under these Rules.

However, the Rules, including the disruption Rule, do provide for *subsequent* restraint or *punishment* which refers to the imposition of a penalty after distribution. This second amendment contains a penalty section (1.6) which provides that if students violate any provision of the Rules, disciplinary action may be taken against them. If either suspension or expulsion,[2] the maximum punishments allowed under the Rules, is deemed necessary, the school is required to follow the procedural due process requirements of a state statute (*Public Law 162, Burns' Ind. Stat. Ann., Sec. 28-5358, et seq.*). This statute was adopted and implemented by Board resolution 1030 (Exhibit C of Additional Paragraph of Answer, filed October 12, 1972). The elaborate safeguards found in this statute and resolution insure that every student will receive due process before being suspended or expelled from school.

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[2] Expulsion is any suspension from school attendance exceeding 5 days.

Respondents' deliberate obliteration of the important distinction between prior and subsequent restraints is revealed also by the cases cited to support the invalidity of these Rules. For example, *Near v. Minnesota, ex rel. Olson* (1931), 283 U.S. 697, cited several times by Respondents did involve prior restraints. *Near* examined a statute, the object of which was not punishment, but suppression of the offending newspaper. This Court, recognizing the difference, stated that the freedom of the press guaranteed by the First Amendment ". . . has meant principally, but not exclusively, immunity from previous restraints or censorship . . . but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity." (283 U.S. at 714, 716).

Respondents' reliance on *New York Times v. United States* (1971), 403 U.S. 713. also reveals its confusion. In the *New York Times* case, the United States government sought to enjoin publication by the Times of the contents of a classified study concerning Viet Nam. Publication was prevented and the case was decided solely on the issue of whether the prior restraint was permissible and not whether subsequent punishment, after publication, would be justifiable. The Court noted that although the government could not justify the suppression or prior censorship of the sensitive documents, this did not mean that newspapers would be immune from criminal action if they did publish this information. It said:

> "Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way." 403 U.S. at 733.

Thus, this Court has not only recognized the distinction between prior and subsequent restraints, it has also approved the basic principle that one may be penalized for publishing some words or information which constitutionally may not be suppressed by prior censorship.

The second and major argument of Respondents examines a single word in the disruption Rule-the term "injury" and suggests hypothetical impermissible applications of this word. For example, they suggest that the Board could expel a student if he wrote an article which was critical of class scheduling, assuming that this would hurt the feelings of someone and thus injure them. This entire argument is particularly unmeritorious because the *CCC* did in fact contain many derogatory, critical articles, and no disciplinary action was taken against students due to these articles. The record clearly reveals that distribution of the *CCC* was prohibited because of the obscenities and indecencies contained therein.

Petitioners' Brief (42-44) sets forth compelling reasons for prohibiting students and courts from indulging in this type of facial examination of Board rules. If the phrase "injury to others" was the only objection to this Rule, the Board would not hesitate to delete it, but the courts below objected to the use of virtually every word in this Rule and apparently believe the Board has no right to discipline students for causing significant disruptions at school. (Pet. Cert. 21A) The Board concludes that it would be impossible to reword this Rule so as to satisfy the Court of Appeals. Judge Christensen, in his dissent, was correct when he said the Rule was neither overbroad nor too vague and perceived no determinative difference between this Rule and the more acceptable rewording suggested by the District Court. (Pet. Cert. 30A)

The third argument of Respondents was that the Board failed by any affirmative evidentiary showing to justify

imposition of the disruption Rule. Again, Respondents ignore the fact that the Rules in question were formulated pursuant to Court order *after* the hearing, were never imposed on the students or the *CCC*, were not declared unconstitutional as applied to anything, and instead were declared void on their face. Thus, the numerous comments throughout the Respondents' Brief that there was no evidence to justify imposition of the various Rules, is totally irrelevant and deliberately misleading. The issue in this case is not the validity of the Rules *as applied* to the *CCC*, but whether the Rules are *facially void* for overbreadth.

Respondents have painted a distorted picture of students distributing vast quantities of many copies of the *CCC* in numerous high schools over a period of two years, claiming that this general distribution caused no incidents of any kind. In fact, the record and reality of the situation is quite different. There was minimal distribution at two high schools out of eleven. There was no evidence that distribution occurred at any other school, nor was there any evidence that distribution at the two schools was more than minimal. In addition, evidence of disruption of the *CCC* is immaterial to the question before this Court, *i.e.*, whether the disruption Rule is void for vagueness and overbreadth.

C. SECTION 1.1.1.4 (NON-STUDENT AUTHORSHIP); SECTION 1.3.1.6 (ANONYMITY).

1. *Literature Not Written By Students or School Employees.*

Section 1.1.1.4 of Rule 11.05 provides for punishment of any student who distributes in school any literature "not written by a student, teacher or other school employee; provided however, that advertisements which are not in conflict with other provisions herein, and are reasonably and necessarily connected to the student publication itself shall be permitted."

The only purpose of Rule 1.1.1.4 was to prevent outside organizations or persons from accomplishing indirectly what they are prohibited from doing directly, that is, selling or distributing literature in the schoolhouse. For example, commercial organizations easily could hire students to distribute flyers advertising their products. This Rule does not have the purpose or effect, as Respondents allege, of imposing "orthodoxy over the classroom," or regulating the content of student publications. Since students remain free to express themselves or to use or quote the ideas of others, the First Amendment rights of students have not been violated.

This Rule does not allow any prior review by school officials or the Board of student literature and thus does not constitute a prior restraint. In fact, the Rule imposes no restraint upon students' expression. Thus, most of Respondents' statements and quotations are totally irrelevant. The cases cited as support by Respondents do not even concern an issue comparable to the one in question. The issue is not whether outside authors could write articles or books which might be worthwhile for students to read, but whether the Board must allow their sale or distribution in the schoolhouse. In fact most were criminal cases. For example, *Sweezy v. New Hampshire* (1957), 354 U.S. 234, did not involve student expression or distribution of literature but simply reversed a contempt conviction because the Attorney General lacked legislative authorization to obtain the type of information demanded from the witness. *New York Times v. United States* (1971), 403 U.S. 713, involved whether an injunction and prior restraint against a newspaper was valid and thus is not pertinent. Respondents' suggestion that the Board is opposed to student exposure to ideas and information written by non-students is ridiculous. If this were true, school libraries filled with articles and books written by non-students would not exist. However, to prohibit students from selling or

distributing in school, materials written by non-students or outside organizations is both essential and reasonable to prevent disorder and interference with school functions. It is the duty of the Board to prevent the problems that would result from permitting the large captive audience of immature minds to be distracted from their tasks by such outside influences.

The Court's decision that this Rule is void for overbreadth places the Board on the horns of a serious dilemma. A more narrow Rule which would permit students to distribute *some* outside materials in school would subject the Board to charges of discrimination or a denial of equal protection. Such a Rule would also create practical administrative problems and would probably necessitate a system of prior approval. The present Rule avoids these problems and is not based on content or arbitrary numbers. The only other alternative is no regulation at all. To allow any and all outsiders to have their materials distributed or sold by students in school would be comparable to opening a floodgate. Serious delays, distractions, disruptions and other problems would result. Obviously it is necessary to draw the line somewhere and the Rule in question is reasonable and avoids the pitfalls and problems of the only other alternatives.

2. *Disclosure of Publication Participants.* Section 1.3.1.6

Section 1.3.1.6 of amended Rule 11.05 provides: "No distributable literature shall be distributed by any student in any school unless the name of every person or organization that shall have participated in the publication of the distributable literature is plainly written in the distributable literature itself."

Contrary to Respondents' assertion, this Rule does not impose upon student publications such as the *CCC* dictatorial prior restrictions which are absent from daily newspapers such as the *Indianapolis Star*. This Rule imposes no

prior restraints whatsoever. Any comparison of the *CCC* to national magazines and daily newspapers is like equating oranges and apples since these daily publications, unlike the *CCC*, display policies and accept responsibilities not evident in the *CCC*. In contrast to the national publications listed by Respondents, the *CCC* is written by children, has no editors and no person(s) in charge and its policy is to publish anything sent to it, as is, with absolutely no verification or editing. It would also be impossible to hold the *CCC* responsible for libel or other abuses of freedom of the press.

Since the present Board Rules allow students to distribute these unedited publications at school, it is incredulous to argue that the Board should have no means to identify those responsible for abuses of freedom of the press. Since no person or organization has any responsibility for this unedited paper, there is obviously no other means for the Board to identify and fix responsibility for fraud, libel, obscenity or other abuses which might appear therein.

Most of Respondents' arguments under this issue are misplaced, inaccurate or irrelevant. A few comments seem appropriate. How this identification Rule is certain to imperil creative writing, as Respondents allege, is a mystery to the Board. It is also not true that the Board argued that its duty was to shield students from advocacy or promotion of expressions of feelings with which it does not wish to contend. (Resp.Br. 69) Indeed, Respondents' entire discussion of the alleged right to advocate illegal action or force at school seems totally misplaced. It is not pertinent to the issue of anonymity.

Respondents also inject an entirely new issue into this case by alleging that the phrase "distributable literature" is both vague and overbroad. This was never alleged or ruled upon in either court below.

Petitioners also fail to see the relevancy of the fact that many *CCC* articles disclosed the first name of its author.

Even if the author of every article to date were identified, this would not demonstrate that such Rule was unnecessary for the future.

Respondents' claimed right to anonymity at school can be compared to the journalist's claimed privilege against appearing before a grand jury and answering questions as to either the identity of his news sources or information which he has received in confidence. This Court has already decided that there is no such constitutional privilege. *Branzburg v. Hayes* (1972), 408 U.S. 665, 33 L.Ed. 2d 626.

The cases cited by Respondents are not valid support for holding this Rule unconstitutional. Most concern criminal statutes which do not even mention or require identification of any person.

For example, both *Rosenbloom v. Metro-Media* (1971), 403 U.S. 29, and *Curtis Publishing Co. v. Butts* (1967), 388 U.S. 130, concern the evolution of constitutional limitations upon state libel laws and whether it is necessary to prove under certain circumstances that the libel was uttered with knowledge that it was false or with reckless disregard of whether it was false or not.

Bates v. Little Rock (1960), 361 U.S. 516, reversed convictions of defendants for their refusal to list the names of the NAACP. The evidence revealed that public identification was followed by harrassment and threats of bodily harm. When state action threatens significantly to impinge upon constitutionally protected freedom the Court said it must determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification. The Court found no relevant correlation between the power of cities to impose occupational license taxes and compulsory disclosure and publication of the membership list of the NAACP. The NAACP also would not fall within any of the occupation classes for which a license is required or a tax payable. In the case

at bar, there was absolutely no evidence that any harrassment or bodily harm did or would result from disclosure of contributors to an underground newspaper. The Board Rule also provides the only reasonable means to identify those responsible for abuses.

D. DISTRIBUTION DURING CLASS HOURS.

Section 1.3.1.1 provides that students shall not distribute literature in school "while classes are being conducted in the school." Since this Rule was adopted after the hearing there is nothing in the record with respect to class schedules or the hours and number of classes throughout the school day in the Indianapolis Public Schools.

Respondents attempt to take advantage of this fact by contending that this Rule is overbroad because it would prohibit student distribution of literature in school if a single class was being conducted somewhere in the school and thus "would effectively prohibit any distribution of literature at any time any persons were present at a . . . school." (Resp.Br. 78, 81) This argument is not only absurd, it is a deliberate misstatement, particularly in view of the fact that the principal must designate certain areas in the school for distribution of literature under Section 1.3.1.2. (App. 23)

The Board submits that Respondents are well aware and this Court can take judicial notice that schoolhouses consist primarily of classrooms which students are required to attend. It would be a strange school indeed which, when filled with students and teachers, only had one or a few classes in session. All students in elementary and secondary schools have schedules which require them to be in a class or other supervised learning activity every period of the day. To suggest that only some students must be in classes while others may run around the school free is preposterous.

Since the basic purpose of Indianapolis schools is to conduct classes and require that students attend them, it is not unreasonable to prohibit any other activity during those classes which would interfere with the schools' proper function and legal duty. To prevent distribution by students in the school which would either delay or interrupt classes is the only purpose and effect of this Rule. Distribution before, after, or between classes clearly is permissible under the Rule.

Respondents' demand that the Board must introduce evidence to prove six of Respondents' justifications for this Rule is unwarranted. All but two of these demands concern proof that distribution disturbs or disrupts classes. Yet it should be obvious that if students who are required to be in class are distributing literature instead, then either they are delaying or disrupting their own class or they are cutting their class. Respondents demand is also unwarranted since there is no evidence that the *CCC* was distributed at any school while classes were being conducted.

The demand for evidence that raising funds for school projects, such as the school yearbook or band, is not disruptive in contrast to the distribution of literature is based on the erroneous presumption that schools allow such solicitations while classes are in session. School projects such as these are one of the functions of homeroom periods set aside for such activities.

The remaining "justifications" assume that students have a right to interfere with other supervised activities such as debates, assemblies, musicals and lunch.

Respondents' statement that it is clear that no other judicial circuit would have permitted this Rule to stand is inaccurate and misleading since no other Circuit Court has been presented with this question. No similar rule was examined in any case cited by Respondents.

In conclusion, this Rule is not void for overbreadth since it is not unconstitutional to prohibit distribution in the classroom or elsewhere in school when students are required to be in a class or other supervised educational activity. This is the only intent and effect of this Rule. The Rule simply accomplishes what the District Court said was permissible—the prohibition of distribution of literature at times and in places where normal classroom activity (defined as organized supervised educational activity) is being conducted. (Pet. Cert. 13A)

ARGUMENT III

OBSCENE, INDECENT LANGUAGE.

1. *The Board Has Not Shifted Its Position.*

Respondents' outrageous claim that there has been a major shift in the Board's position on this issue is a deliberate attempt to distort the record and confuse this Court. The Board's briefs in the District Court, Court of Appeals and this Court reveal that its position on this issue has remained the same—that language found throughout the *CCC* such as "f- - -," "eat shit," awarding points for the number of "freak girls screwed," a blazing headline "ON YOUR ASS" and a cartoon depicting the principal on a toilet and a student eating his shit, render the *CCC* obscene as to minors, and that school authorities can both prevent and punish students for using such language in elementary and secondary schools even if such language is held to be vulgar and indecent but not legally obscene as to minors.

The mere fact that two of the three judges of the Court of Appeals rejected the Board's argument that the *CCC* is obscene as to minors has neither changed the opinion of the Board nor shifted its position as Respondents allege.

The Board believes that an important function of its schools is to teach children to use language properly. If it

permits the distribution of such filthy language in its schools and cannot reprimand and discipline children for writing such four-letter words as are found in the *CCC*, then schools will not be able to accomplish one of their basic responsibilities. Such permission would also encourage children to become "juvenile delinquents" since a state statute defines a "delinquent child" as any boy or girl under 18 years of age who "uses vile, obscene, vulgar or indecent language." *Burns' Ind. Stat. Ann., Sec. 9-3204 (13); I. C. 31-5-7-4.*

The label attached to such language is immaterial so long as schools are permitted to attempt to control its use by children in school either through prior or subsequent restraints. It is incredible that the right of schools to maintain a basic level of decency in the use of language by children at school should even be questioned, let alone denied. There can be no doubt that such basic decency cannot be maintained if school officials must allow children to write and distribute such obscene, vulgar language throughout the school because children learn by example.

2. *Board Has Promulgated Rules Prohibiting Indecent Language.*

Respondents' assertion that "the Board has promulgated no rules which prohibit filthy, vulgar and indecent language" (Resp.Br. 84-85) is rather puzzling since one of the guidelines under its Rule requiring prior approval states that "no material shall be distributed which contains indecedent, vulgar or profane language, cartoons, or pictures." (App. 19) Board Resolution 1030 also permits a student's suspension from school for the use of abusive and/or vulgar, indecent language. (Exhibit C of Additional Paragraph of Answer filed 10-12-72) Thus, Respondents' assertion that the Board has no right to ask this Court to determine its powers to impose either prior or subsequent

restraints on students who utilize such language can scarcely be considered an anticipatory question. It always has been considered by the Board to be the most crucial question in this case, and one which has been thoroughly briefed and argued before both courts below and accepted for review by this Court.

3. *Rules and Decisions Cover Elementary School Students.*

The first time that Petitioners were informed that Respondents considered the proceedings or Board Rules in the case at bar to be limited to high school students was at the oral argument before the Seventh Circuit Court of Appeals. Respondents were there asked about the effect of filthy language upon elementary school students. In response to this question, they replied that this case involved only high school students. This came as a distinct surprise to Petitioners, since all the Rules in question undoubtedly and clearly apply to all students in the Indianapolis Public Schools, including those in the elementary schools. The lengthy briefs filed by Petitioners in the courts below reveal that elementary students were considered to be an important part of this case. Respondents never denied this fact. The injunction of the District Court which was upheld by the Court of Appeals and all of the Rules in question apply to both elementary and secondary schools. Judge Christensen in his dissent stated:

> "That at oral argument 'plaintiffs conceded that their case was limited to the application of the rules in high schools' does not seem to me a sufficient reason for our failure to hold as to elementary schools of all places that the trial court's decision involved error. Appellees should not be permitted to waive the contentions of appellants, who have argued here both overbreadth and invalidity of the injunction." (Pet. Cert. 31A)

Respondents' contention seems even more bizarre in view of the fact that Respondents at no time in the proceedings or briefs below claimed that their arguments were limited to high school students or conceded that the Board Rules constitutionally could be applied to elementary students. Although the student plaintiffs were indeed high school students, their Complaint stated a class action on "behalf of themselves and all others similarly situated."

It is not incumbent upon the Board to show any evidence of distribution of the *CCC* to elementary students since actual distribution is totally irrelevant to the issue of the facial validity of said Rules which were never applied to students either in elementary or secondary schools. These Rules were declared facially void and Respondents would be the first to complain and demand punitive damages for lack of good faith on the part of the Board if it attempted to apply the Rules to elementary students.

The Court of Appeals noted that the District Court's injunction is broad enough to cover enforcement of the Rules at elementary schools. (Pet. Cert. 29A) When the Court upheld the injunction in its entirety and the facial invalidity of said Rules, it implicitly held that these Rules constitutionally could not be applied to any students despite its statement that "it had no occasion to decide whether or not age difference and the like would lead to a different ruling concerning elementary schools." (Pet. Cert. 29A)

4. *CCC Is Obscene as to Minors.*

a. *Language of CCC is Erotic, Sexually Explicit, and Appeals to Prurient Interests of Minors.*

For Respondents to state that the record contains no evidence, not even speculative testimony, indicating that any of the material in the *CCC* is patently offensive or appeals to the prurient interests of minors is astounding in view of the fact that the only evidence in this case, except

a few self-serving statments of some of the students, reveals that the *CCC* is obscene as to minors. The Court is referred to Superintendent Kalp's statements (App. 11-17) and an affirmation signed by the principals of Indianapolis high schools and some 220 parents (App. 63-64) which reveal that, applying local standards, certain material in the *CCC* indeed meets all of the elements of obscenity. Indeed, even a student plaintiff referred to "the obscene matters that were involved" in the *CCC*. (App. 39).

b. *Respondents' Cases are Distinguishable from Case at Bar.*

Although Respondents cite a number of decisions which illustrate an increasing immunity from *criminal* sanctions for filthy expressions when used by adults, these rulings by no means legitimatize the sale and distribution of such obscenities to minors in the schoolhouse.

Respondents' attempt to equate the findings in *Bazaar v. Fortune* (5th Cir., 1973), 476 F.2d 570, and the case at bar is misleading and an apparent attempt to divert the Court's attention from the fact that we are, in the instant case, concerned only with minors in elementary and secondary schools.

Respondents cite two high school cases, but neither decision stands for what Respondents claim it does. *Vought v. Van Buren Public Schools* (E.D. Mich., 1969), 306 F. Supp. 1388, concerned the expulsion of a high school student for possession of a single copy of *The Argus*, a 24 page tabloid-type publication containing serious articles written grammatically, which publication apparently contained the word "f---." The possession by the student of this publication on one occasion violated the school's policy against possession of obscene literature. The Court, in reversing the expulsion, noted that the same words were found in the book *Catcher in the Rye*, which the plain-

tiff student was required to read in the 10th grade, and which is now required reading in the 9th grade at said school. This book used the same word six times. This word was also found in an issue of "Harper's" magazine found in the school library. The board objected to the subjection of the student to a double standard whereby he was required to read literature containing the word which appeared in the publication "Argus," the mere possession of which, on one occasion, was the sole reason for his expulsion. The Court stated that this inconsistency was so inherently unfair as to be arbitrary and unreasonable, constituting a denial of due process. Thus, the facts and issues in this case are entirely different from those of the case at bar. In *Vought* the Court said that the board rule requiring the expulsion of any student found with obscene literature in his possession did not violate the First Amendment. The rule was not declared unconstitutional. Indeed, the Court said that the school's obligation "to prescribe and control conduct in the schools" must be held to encompass the promulgation of rules concerning the extent to which and the conditions under which obscene materials may or may not be properly on the school premises. It is highly significant that the double standard which was the basis for the Court's decision in *Vought* is not present in the case at bar. Thus, this case, instead of supporting Respondents' position, is actually more supportive of Petitioners' position.

Keefe v. Geanakos (1st Cir. 1969), 418 F.2d 359, was cited by Respondents as perhaps the strongest case on the "earthy word" issue. In this action by a tenured high school teacher to enjoin the school from discharging him for reading and discussing the term "bastard" contained in a magazine with high school seniors, the Court, although agreeing with the school that what is to be said or read to students is not to be determined by obscenity standards

for adult consumption, granted the injunction pending a decision on the merits. The Court found that some measure of public regulation of classroom speech is appropriate, but the circumstances of the utterance must be considered. There was absolutely nothing in this case about the use of this term by students in the high school or whether such use could or could not lead to punishment of students. Thus, this case does not stand for the proposition contended by Respondents that the use of said word is not an adequate basis upon which to punish students. (Resp.Br. 102)

Although the Board disagrees with the majority in *Papish v. University of Missouri* (1973), 410 U.S. 667, this case involved *adults* at a university, the environment of which is substantially different from that found in any elementary or secondary school. It should be obvious that rules which may be unacceptable on a university campus may be absolutely essential in elementary and secondary schools.

Respondents also attempt to paint an erroneous picture when they imply that expulsion is the only action that could or would be taken against students who violate any of the Board Rules. Expulsion is the last resort of any school official and the penalty section of the Rules allows many other types of discipline to be taken against a student for violation of the Rules, ranging from a simple reprimand to expulsion from school for a limited period.

Contrary to Respondents' assertion, the Board is not asking this Court to write an acceptable "obscene as to minors" rule for it. The validity of the Board's obscene as to minors Rule is not an issue before this Court since it was upheld by the District Court, which holding was not appealed by Respondents. The Board is requesting this Court to hold that under the tests in *Miller v. California* (1973), 413 U.S. 15, the language contained in the *Corn Cob Curtain* is obscene as to minors.

5. *No Double Standard Exists.*

Respondents state that the Board is seeking to establish a double standard by attempting to keep filthy, obscene, four-letter words and cartoons out of the *CCC* when such language "is necessarily already in its schools in innumerable instances, whether in books, magazines, newspapers, locker room conversation, or otherwise." (Resp. Br. 100) Yet, Respondents introduced no evidence at the hearing to prove that the same or similar language was found in the school library or in publications required to be read by students. Even assuming that some students utilize such language in locker room conversations, this is not a valid justification to force school authorities to permit children to write and sell or distribute such language to other children in the schoolhouse. Respondents also assert that to be consistent the Board would have to ban from the schools national newspapers such as the *Wall Street Journal* and the *New Yorker.* Although no evidence was offered to show that said publications are found or used in the Indianapolis school libraries or classes, the Board submits that even if such words could be found in these publications, it does not logically follow that students must be allowed to try their hand at writing the same word(s), and circulating it at school.

In conclusion, while the Board in its Brief has presented many compelling reasons for allowing school authorities to discipline students for using and distributing at school the obscene, indecent language found in the *CCC,* Respondents have failed to state even one valid reason for allowing children to be exposed to such filth in schools which they are forced to attend.

ARGUMENT IV

PRIOR APPROVAL OF LITERATURE.

This issue concerns whether the Board may adopt reasonable Rules requiring prior approval by school au-

thorities of literature before its distribution in elementary and secondary schools and the validity of the Rule adopted by the Board which imposes such prior restraints. This Rule is reprinted at App. 17-20.

Respondents' claim that this issue is being raised for the first time before this Court and was at no time before the trial or appellate court for review is both astounding and puzzling. It is also false. The Board's Brief submitted to the Court of Appeals also raised and thoroughly covered this question (p. 54-60), and requested the Court to declare that the Board has a right to a prior review of materials distributed in its schools and that its Rule of prior review was constitutional. (p. 69-70)

The mere fact that the District Court advised Petitioners that it would tolerate no Rule containing prior restraints and that its amended Rule (prior approval with safeguards) was unconstitutional and further ordered Petitioners to amend that Rule, which Petitioners did, does not remove the validity of this Rule from the consideration of this Court. Nor can the fact that the Court of Appeals ignored the Board's request to determine this issue prevent its consideration by this Court, especially since the injunction and decision of the District Court was affirmed in every respect by the Court of Appeals.

ARGUMENT V

REFUSAL TO APPLY F.R.C.P. 17(c).

Rule 17(a), Federal Rules of Civil Procedure, which provides that every action shall be prosecuted in the name of the real party in interest, is totally irrelevant to this Court's determination of whether the District Court committed reversible error by refusing to apply *Rule 17(c), Federal Rules of Civil Procedure* to the case at bar. The question in the instant appeal is whether the Court complied with the mandate of *F.R.C.P. 17(c).* This question involving

the requirement of a guardian ad litem or other protective order for infant parties should not be confused with the unrelated question of whether a party is the real party in interest—*i.e.*, the person who possesses the right sought to be enforced

Respondents' claim that *Fujishima v. Board of Education* (7th Cir. 1972), 460 F.2d 1355, settles this issue is rather remarkable in view of the fact that questions concerning the plaintiffs' infancy and the necessity of the appointment of a guardian ad litem were not even raised in that case. Respondents' statement that minors are "persons" entitled to constitutional protections is not even pertinent to this question. Infants are also entitled to other protections such as *F.R.C.P. 17(c)*.

Once again Petitioners must object to Respondents' attempt to misstate the record and confuse this Court by claiming that some of the plaintiffs attained the age of 18 years and thus are no longer under any legal disability under Indiana law. During the hearing in the trial court, evidence did reveal that at least three of the named plaintiffs were 18 years old and had graduated from Indianapolis high schools. Because of this discovery the Court ruled that they had no standing to sue in this cause. The remaining named plaintiffs were still IPS students and were under 18 years of age.

Respondents' argument is also highly improper because the Indiana law at the time of this suit defined minors and persons "under legal disabilities" as any person under *21* years of age. *Burns' Ind. Stat. Ann., Sec. 2-4701; I. C. 34-1-67-1.* This statute was amended on April 16, 1973, eight months *after* the hearing in this cause. Thus, this amendment (which lowered the age of minors to include only those persons under 18 years of age) can have no possible relevance to the case at bar. However, it is interesting to

note that the title of this statute reads: "an Act to amend . . . [certain Indiana statutes] as they relate to the age requirements for persons to be parties in civil suits and appear before courts without guardians."

F.R.C.P. 17(b) does provide that the capacity of an individual to sue or be sued shall be determined by the law of his domicile and *Indiana Trial Rule 17(C)* does permit an infant to sue in his own name. But the mere fact that an infant has capacity to sue in his own name in Indiana does not mean that the Court can dispense with the requirement of appointing a guardian ad litem for said infant. The same *Indiana Trial Rule 17(C)* provides:

> "*If* an infant . . . is not represented, or is not adequately represented, the court *shall* appoint a guardian ad litem for him. . . . The court, in its discretion may honor the infant's . . . choice of next friend or guardian ad litem but the court may deny approval or remove a person who is not qualified." (Emphasis added.)

Despite the capacity of an infant in Indiana to sue in his own name, this does not mean that procedural rule *F.R.C.P. 17(c)* is not applicable or controlling. The second sentence of the Federal Rule provides:

> "If an infant does not have a duly appointed representative, he may sue by his next friend or by a guardian ad litem."

The situation in the instant case meets the precise condition of this second sentence. This provision "is unconditional, in no way dependent upon the capacity, under the law of the domicile for a party . . . " *68 A.L.R. 2d 754.*

The third sentence of *F.R.C.P. 17(c)* provides:

> "The Court shall appoint a guardian ad litem for an infant . . . not otherwise represented in an ac-

tion or shall make such other orders as it deems proper for the protection of the infant . . . "

Thus, the federal law, in contrast to Indiana law, does not require the appointment of a guardian ad litem in all cases. Nevertheless, although the judge retains some discretion, the Rule is clearly mandatory. The Court is given a choice of either appointing a guardian ad litem or making "such other orders as is deemed necessary for the protection of the infant." In the case at bar, the Court did neither. At the very least he was required to make a *factual judicial determination* that the infant was already adequately protected before he could dispense with the necessity of appointing a guardian ad litem. *Roberts v. Ohio Casualty Insurance Co.* (5th Cir. 1958), 256 F.2d 35.

This case contains an excellent and thorough explanation of *F.R.C.P. 17(c)*. Respondents' attempt to distinguish *Roberts* because the unrepresented minor sought reversal, and money damages were involved, is unmeritorious. The application of the Rule is in no way dependent upon the nature of the claim. Since the law is well settled that infants can seek and achieve reversal of a decision if the Rule is ignored, it would violate the equal protection clause and basic principles of justice to require adults, but not minors, to be bound by a decision in a case where the mandate of the Rule was clearly ignored.

The mandate was clearly ignored in the instant case because the court failed to exercise any of the options required by *F.R.C.P. 17(c)*. (1) There was no judicial finding that the two infant plaintiffs were protected without a guardian, *Roberts, supra;* (2) the court failed to either appoint a guardian ad litem; or (3) make such other order as is deemed necessary for the protection of the infants.

In *Brown v. Ripley* (Fla.App. 1960), 119 So.2d 712, a Florida statute identical to *F.R.C.P. 17(c)* was interpreted

by the court. It held that the following factors are irrelevant and do not excuse compliance with the rule: the fact that the infant defendant was 19 years of age, was represented by able trial counsel, was living away from home in pursuit of full-time employment and the failure of the court to appoint a guardian ad litem for him did not result in any prejudice to his rights or in a miscarriage of justice. The court stated that although there was no contention that had a guardian ad litem been appointed, any defenses otherwise available would have been urged, or any proof different from that presented would have been adduced in support thereof, and it affirmatively appeared from the record that defendant was sufficiently mature to capably assist in the formulation, preparation and presentation of his defense, these factors were likewise impertinent to the issue. The judgment was accordingly reversed.

Unlike the case at bar, in both *Brown, supra* and *Roberts, supra,* the question of whether a guardian ad litem should be appointed or an order entered was never presented to the trial court. Nevertheless, the court held that "failure to follow the rule of procedure here involved is as restrictive upon the power of the trial court to render a decree as where jurisdiction is lacking . . . Affirmative action is necessary to satisfy the rule." (119 So.2d at 717)

In conclusion, the decision should be reversed because the District Court, when properly and timely requested, refused to comply with *any* of the options required by *F.R.C.P. 17(c),* but instead held that this Rule did not apply in a case where constitutional questions were raised.

CONCLUSION

It is therefore respectfully submitted that Respondents have not shown this Court that the decisions below should not be reversed in their entirety. Therefore, Petitioners respectfully request the relief prayed for in their original Brief.

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